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IN THE

Supreme Court of the United States

October Term, 1954.

No. 415

BALLEROCK OIL COMPANY, a California corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Appellee.

On Appeal From the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

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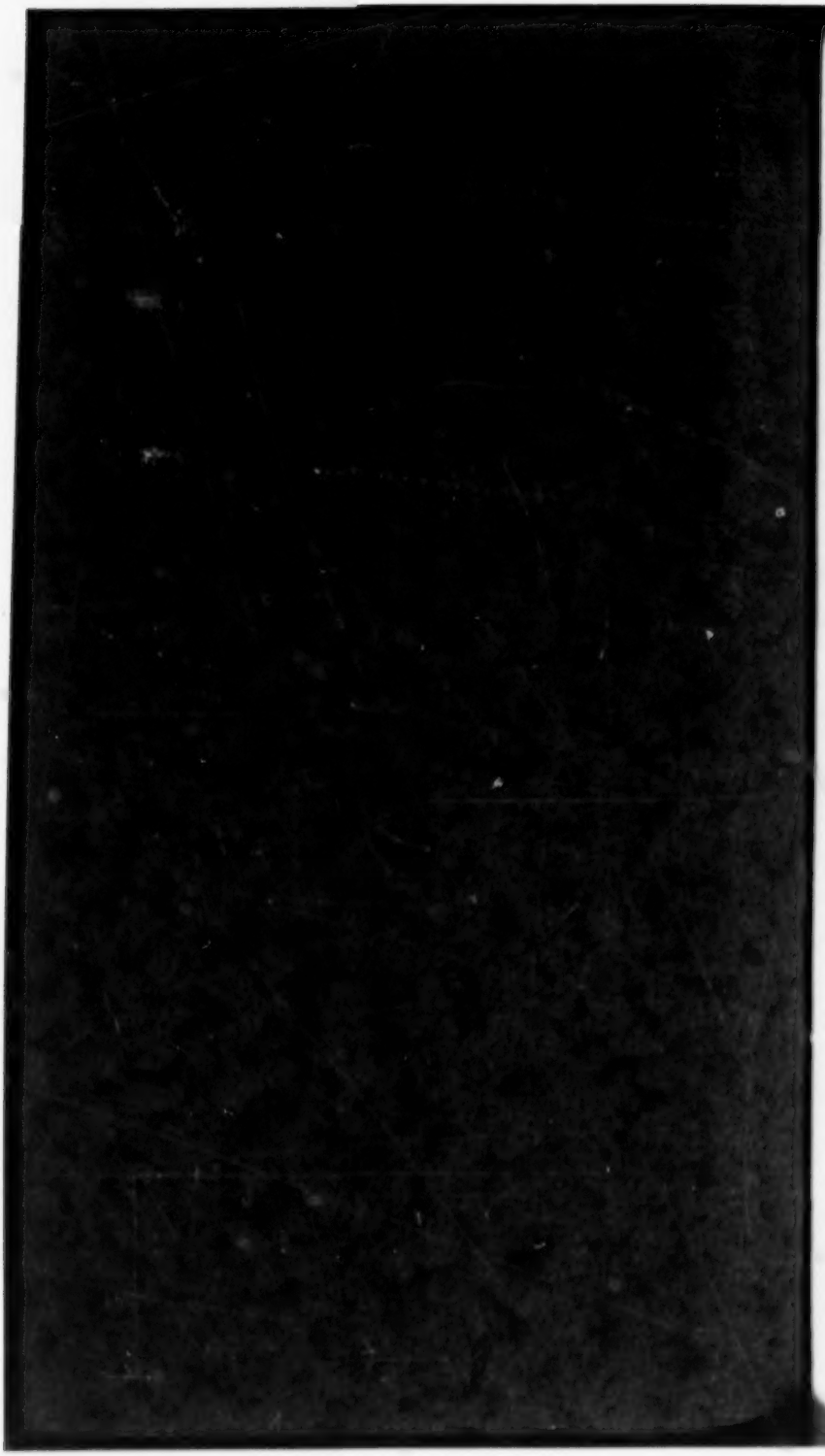

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 415

BELRIDGE OIL COMPANY, a California corporation,
Appellant,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Appellee.

On Appeal From the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

Finality of Judgment.

The first jurisdictional question to be decided on this appeal is whether the judgment appealed from is final within the meaning of 28 U. S. C., Section 1257. That question was raised and discussed at some length in appellant's Jurisdictional Statement, at pages 5 to 14.

Appellee states, at pages 3 and 4 of its Motion to Dismiss, merely that it does not question the Court's jurisdiction on the ground of lack of finality of the judgment. Appellee does not, however, give any reason or citation which would indicate that the judgment of the

California Supreme Court is final within the meaning of 28 U. S. C., Section 1257.

It is submitted that the judgment of the California Supreme Court lacks the finality which is requisite to this Court's jurisdiction.

The following discussion of the second jurisdictional question is based upon the assumption, contrary to appellant's belief, that the judgment of the California Supreme Court is final within the meaning of 28 U. S. C., Section 1257.

Federal Question.

The jurisdictional question raised by appellee in its Motion to Dismiss is itself a constitutional question which will be reached and decided only if this Court's jurisdiction cannot be determined on a non-constitutional ground. (*Alma Motor Co. v. Timken-Detroit Axle Co.* (1946), 329 U. S. 129.) The question of whether this appeal raises a Federal question necessarily involves a determination of whether the prohibitions of the Fourteenth Amendment to the Constitution of the United States extend to the municipal tax involved in this case.

Appellant contends that Section 21.166 of the License Ordinance of the City of Los Angeles violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States if that section is applied so as to impose a tax based upon a larger portion of appellant's gross receipts than is fairly attributable to the small portion of its activities conducted within the City. (U. S. C., Const., Amend. 14, Sec. 1; Ord. 77,000, Chap. 2, Art. 1 of the Los Angeles Mun. Code.)

It is inherent in appellant's contention that neither the State of California nor the City of Los Angeles has the power under the Fourteenth Amendment to tax appellant's Kern County activities for the benefit of the City of Los Angeles. The question is not, as indicated by appellee's Motion to Dismiss, whether the amount of the tax claimed by appellee could have been validly imposed by the State. The question is whether this particular tax, for the particular purposes and under the circumstances obtaining in this case, violates the due process and equal protection clauses of the Fourteenth Amendment. (*Postal Telegraph-Cable Co. v. Taylor* (1904), 192 U. S. 64; *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 6* (1921), 256 U. S. 658.)

Postal Telegraph-Cable Co. v. Taylor, supra, involved a municipal ordinance which purported to impose a license fee of about $200 on the telegraph company as a police measure. Although the Pennsylvania Supreme Court had held the ordinance valid and although the State of Pennsylvania could have imposed a tax in that amount upon the telegraph company as a revenue measure, this Court held the ordinance void because the tax was unreasonable and excessive as a municipal levy for the particular purpose involved in that case.

In *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 6, supra,* a local assessment for a road improvement had been upheld by the Supreme Court of Arkansas. Although the amount of the assessment might have been validly imposed as a state revenue measure upon the railroad, this Court held the statute enabling the local assessment for the particular improvement void under the circumstances of that case as being a violation of the equal protection clause of the Fourteenth Amendment.

The tax claimed by appellee is an attempted extra-territorial extension of its taxing power in violation of the due process clause of the Fourteenth Amendment under the cases cited at pages 15 to 20 of appellant's Jurisdictional Statement.

The tax claimed by appellee also violates the equal protection clause of the Fourteenth Amendment because it discriminates against taxpayers doing business within more than one taxing jurisdiction. If a tax under Section 21.166 of the License Ordinance may be imposed upon the total gross receipts of appellant's "selling" business conducted only partly within the City of Los Angeles, then another tax could be imposed in Kern County upon the same total gross receipts. Similarly, if appellant's "selling" business were conducted in three different taxing jurisdictions, it could be subjected to three taxes, each upon its total gross receipts. The same "selling" business, however, would be subject to only one such tax if all its activities were conducted within one taxing jurisdiction. The same business conducted partly in each of two or three taxing jurisdictions would derive no more protection and benefit in the aggregate from the two or three local governments than it would from one local government if conducted wholly within one taxing jurisdiction. The taxation by one taxing jurisdiction of a larger portion of a taxpayer's business than is conducted within the jurisdiction necessarily results in discrimination and a denial of equal protection of the laws. (*Security Truck Line v. City of Monterey* (1953), 117 Cal. App. 2d 441, 256 P. 2d 366, rehear. den. 257 P. 2d 755.)

Owensboro Waterworks Company v. Owensboro (1906), 200 U. S. 38, is not in point in this appeal. There,

the Supreme Court held that the failure of a municipality properly to discharge its duties under valid legislative enactments was a violation only of the state laws and not a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court pointed out that

> ". . . It is not contended that the legislative enactments by the authority of which the city intends to establish and maintain a system of waterworks are inconsistent either with the constitution of Kentucky or the Constitution of the United States . . ." (200 U. S. at 45.)

The validity of a legislative enactment, not the legality of administration under a valid enactment, is in issue in this proceeding.

Keokuk Bridge Co. v. Salm (1922), 258 U. S. 122, is helpful to appellant, to the extent it has a bearing on this appeal. There, suit was brought in a United States District Court to enjoin county officials from collecting a county real property tax based upon an assessment alleged to deny substantive due process and equal protection of the laws in violation of the Fourteenth Amendment. On direct appeal from the District Court, the Supreme Court held that the District Court had jurisdiction although diverse citizenship did not exist, and affirmed the decree of the District Court dismissing the bill for want of equity, on the grounds that the plaintiff had an adequate remedy at law and that plaintiff had not alleged tender of the amount of taxes equitably due. The existence of a Federal question for the jurisdictional purposes of this appeal is supported by the *Keokuk* case.

Wells, Fargo & Co. v. Nevada (1918), 248 U. S. 165, has no apparent bearing on this appeal. There, this Court held that a Nevada property tax did violate the commerce clause and that the taxpayer had not been denied procedural due process. Appellant has not raised, and does not now raise, any question of procedural due process.

Conclusion.

It is submitted that the motion of appellee to dismiss for lack of a substantial Federal question should be denied.

Respectfully submitted,

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Of Counsel.